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8 UNITED STATES DISTRICT COURT
9 FOR THE WESTERN DISTRICT OF WASHINGTON
10 AT SEATTLE

11 KEYBANK NATIONAL ASSOCIATION,
12 an Ohio Corporation,

13
14 Plaintiff,

15 v.

16 SPIKE TELECOMMUNICATIONS, INC.,
17 a Washington corporation; GREGORY A.
18 HUGHEY, a Washington resident; and
19

NO. C18-1781 RSM

**AGREEMENT REGARDING
DISCOVERY OF
ELECTRONICALLY STORED
INFORMATION AND ORDER**

20 The parties hereby stipulate to the following provisions regarding the discovery of
21 electronically stored information (“ESI”) in this matter:

22 **A. General Principles**

23 1. An attorney’s zealous representation of a client is not compromised by conducting
24 discovery in a cooperative manner. The failure of counsel or the parties to litigation to cooperate
25 in facilitating and reasonably limiting discovery requests and responses raises litigation costs and
26

1 contributes to the risk of sanctions.

2 2. The proportionality standard set forth in Fed. R. Civ. P. 26(b)(1) must be applied in
3 each case when formulating a discovery plan. To further the application of the proportionality
4 standard in discovery, requests for production of ESI and related responses should be reasonably
5 targeted, clear, and as specific as possible.

6 **B. ESI Disclosures**

7 Within 30 days after the date of this Agreement, or at a later time if agreed to by the parties,
8 each party shall disclose:

9 1. Custodians. The TWO custodians most likely to have discoverable ESI in their possession,
10 custody or control. The custodians shall be identified by name, title, connection to the instant
11 litigation, and the type of the information under his/her control.

12 2. Non-custodial Data Sources. A list of non-custodial data sources (e.g. shared drives,
13 servers, etc.), if any, likely to contain discoverable ESI.

14 3. Third-Party Data Sources. A list of third-party data sources, if any, likely to contain
15 discoverable ESI (e.g. third-party email and/or mobile device providers, “cloud” storage, etc.)
16 and, for each such source, the extent to which a party is (or is not) able to preserve information
17 stored in the third-party data source.

18 4. Inaccessible Data. A list of data sources, if any, likely to contain discoverable ESI
19 (by type, date, custodian, electronic system or other criteria sufficient to specifically
20 identify the data source) that a party asserts is not reasonably accessible under Fed. R. Civ.
21 P. 26(b)(2)(B).

22 **C. Preservation of ESI**

23 The parties acknowledge that they have a common law obligation to take reasonable and
24 proportional steps to preserve discoverable information in the party’s possession, custody or
25 control. With respect to preservation of ESI, the parties agree as follows:

26 1. Absent a showing of good cause by the requesting party, the parties shall not be

1 required to modify the procedures used by them in the ordinary course of business to back-up
2 and archive data; provided, however, that the parties shall preserve all discoverable ESI in their
3 possession, custody or control.

4 2. All parties shall supplement their disclosures in accordance with Rule 26(e) with
5 discoverable ESI responsive to a particular discovery request or mandatory disclosure where that
6 data is created after a disclosure or response is made (unless excluded under (C)(3) or (D)(1)-
7 (2) below).

8 3. Absent a showing of good cause by the requesting party, the following categories of
9 ESI need not be preserved:

- 10 a. Deleted, slack, fragmented, or other data only accessible by forensics.
- 11 b. Random access memory (RAM), temporary files, or other ephemeral data
12 that are difficult to preserve without disabling the operating system.
- 13 c. On-line access data such as temporary internet files, history, cache, cookies, and
14 the like.
- 15 d. Data in metadata fields that are frequently updated automatically, such as last-
16 opened dates (see also Section (E)(5)).
- 17 e. Back-up data that are substantially duplicative of data that are more
18 accessible elsewhere.
- 19 f. Server, system or network logs.
- 20 g. Data remaining from systems no longer in use that is unintelligible on the systems
21 in use.
- 22 h. Electronic data (e.g. email, calendars, contact data, and notes) sent to or from
23 mobile devices (e.g., iPhone, iPad, Android, and Blackberry devices), provided
24 that a copy of all such electronic data is routinely saved elsewhere (such as on a
25 server, laptop, desktop computer, or “cloud” storage).

21 **D. Privilege**

22 1. With respect to privileged or work-product information generated after the filing of the
23 complaint, parties are not required to include any such information in privilege logs.

24 2. Activities undertaken in compliance with the duty to preserve information are protected
25 from disclosure and discovery under Fed. R. Civ. P. 26(b)(3)(A) and (B).

26 3. Information produced in discovery that is protected as privileged or work product shall

1 be immediately returned to the producing party, and its production shall not constitute a waiver
2 of such protection, if: (i) such information appears on its face to have been inadvertently produced
3 or (ii) the producing party provides notice within 15 days of discovery by the producing
4 party of the inadvertent production.

5 4. Privilege Log Based on Metadata. The parties agree that privilege logs shall include
6 a unique identification number for each document and the basis for the claim (attorney-client
7 privileged or work-product protection). For ESI, the privilege log may be generated using
8 available metadata, including author/recipient or to/from/cc/bcc names; the subject matter or title
9 and date created. Should the available metadata provide insufficient information for the purpose
10 of evaluating the privilege claim asserted, the producing party shall include such additional
11 information as required by the Federal Rules of Civil Procedure.

12 **E. ESI Discovery Procedures**

13 1. On-site inspection of electronic media. Such an inspection shall not be permitted
14 absent a demonstration by the requesting party of specific need and good cause or by agreement
15 of the parties.

16 2. Search methodology. The parties shall timely attempt to reach agreement on
17 appropriate search terms, or an appropriate computer- or technology-aided methodology, before
18 any such effort is undertaken. The parties shall continue to cooperate in revising the
19 appropriateness of the search terms or computer- or technology-aided methodology.

20 In the absence of agreement on appropriate search terms, or an appropriate computer- or
21 technology-aided methodology, the following procedures shall apply:

22 a. A producing party shall disclose the search terms or queries, if any, and
23 methodology that it proposes to use to locate ESI likely to contain discoverable information. The
24 parties shall meet and confer to attempt to reach an agreement on the producing party's search
25 terms and/or other methodology.

26 b. If search terms or queries are used to locate ESI likely to contain

1 discoverable information, a requesting party is entitled to no more than 5 additional terms or
2 queries to be used in connection with further electronic searches absent a showing of good cause
3 or agreement of the parties. The 5 additional terms or queries, if any, must be provided by the
4 requesting party within 14 days of receipt of the producing party's production.

5 c. Focused terms and queries should be employed; broad terms or queries,
6 such as product and company names, generally should be avoided. Absent a showing of good
7 cause, each search term or query returning more than 250 megabytes of data is presumed to be
8 overbroad, excluding Microsoft PowerPoint files, image and audio files, and similarly large file
9 types.

10 d. The producing party shall search both non-custodial data sources and ESI
11 maintained by the custodians identified above.

12 3. Format. The parties agree that ESI will be produced to the requesting party with
13 searchable text, in a format to be decided between the parties. Acceptable formats include, but are
14 not limited to, native files, multi-page TIFFs (with a companion OCR or extracted text file),
15 single-page TIFFs (only with load files for e-discovery software that includes metadata fields
16 identifying natural document breaks and also includes companion OCR and/or extracted text
17 files), and searchable PDF. Unless otherwise agreed to by the parties, files that are not easily
18 converted to image format, such as spreadsheet, database and drawing files, should be produced
19 in native format.

20 4. De-duplication. The parties may de-duplicate their ESI production across
21 custodial and non-custodial data sources after disclosure to the requesting party.

22 5. Metadata fields. If the requesting party seeks metadata, the parties agree that only
23 the following metadata fields need be produced: document type; custodian and duplicate
24 custodians; author/from; recipient/to, cc and bcc; title/subject; file name and size; original file
25 path; date and time created, sent, modified and/or received; and hash value.
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2 Respectfully submitted,

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4 DATED: March 27, 2019

5 WONG FLEMING, P.C.

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24 **ORDER**

25 Based on the foregoing, IT IS SO ORDERED this 27th day of March 2019.

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RICARDO S. MARTINEZ
CHIEF UNITED STATES DISTRICT JUDGE